No. _____ (1)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 2004

BENON JOHN TRAWINSKI,
PETITIONER,

V.

UNITED TECHNOLOGIES CARRIER CORPORATION;
COMFORT SYSTEMS, U.S.A. (OWNER AND
PARENT CORPORATION OF STANDARD HEATING
AND AIR CONDITIONING CO.),
RESPONDENTS.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

Did the Eleventh Circuit Court of Appeals depart exceedingly from the accepted and usual course of judicial proceedings and did this Court of Appeals sanction such departure by the lower Court?

CORPORATE DISCLOSURE STATEMENT

Respondent Comfort Systems, U.S.A., hereinafter called Comfort Systems, is a corporation incorporated under the laws of the State of Delaware, having its corporate headquarters at 777 Post Oak Boulevard, Houston, Texas 77056. Comfort Systems is the owner and parent corporation for Standard Heating and Air Conditioning Co., hereinafter called Standard Co..

Respondent United Technologies Carrier Corporation (hereinafter called Carrier) is a corporation incorporated under the laws of the State of Delaware. Its North American Operations are headquartered at Carrier Parkway, Syracuse, New York 13221. The address of its corporate headquarters is United Technologies Carrier Corporation, One Carrier Place, Farmington, Connecticut 06034.

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OPINION BELOW

The United States Eleventh Circuit Court PER CURIAM of July 7, 2004 is reproduced in the Appendix at pages 1-6. The PER CURIAM August 26, 2004 Order denying Petition for Rehearing is reproduced in the Appendix at page 7.

JURISDICTION

The judgment (App. 1-6) sought to be reviewed was entered July 7, 2004. This petition for a writ of certiorari is being filed within 90 days after denial of the Petition for Rehearing (App. 7), pursuant to the United States Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES

The criminal statutes involved in this case are codified in Alabama Criminal Code Title 13A and are classified under Chapter 6, Article 2 as Assaults. These statutes read as follows:

> § 13A-6-23. Menacing.
>
> (a) A person commits the crime of menacing if, by physical action, he intentionally places or attempts to place another person in fear of imminent serious physical injury.
> (b) Menacing is a Class B misdemeanor. (Acts 1977, No. 607, p. 812, § 2110)
>
> § 13A-6-24. Reckless Endangerment.
>
> (a) A person commits the crime of reckless endangerment if he recklessly engages in conduct which creates a

substantial risk of serious physical injury to another person.
(b) Reckless endangerment is a Class A misdemeanor. (Acts 1977, No. 607, p. 812, § 2115)

§ 13A-6-25. Criminal coercion.

(a) A person commits the crime of criminal coercion if, without legal authority, he threatens to confine, restrain or to cause physical injury to the threatened person or another, or to damage the property or reputation of the threatened person or another with intent thereby to induce the threatened person or another against his will to do an unlawful act or refrain from doing a lawful act.
(b) Criminal coercion is a Class A misdemeanor. (Acts 1977, No. 607, p. 812, § 2125)

A civil statute involved in this case is codified in Alabama Civil Code and read as follows.

§ 6-5-104. Deceit - Fraudulent deceit.

(a) One who willfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage he thereby suffers.
(b) A deceit within the meaning of this section is either:
(1) the suggestion as a fact of that which is not true by one who does not believe it to be true;
(2) The assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true;
(3) The suppression of a fact by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact; or
(4) A promise made without any intention of

performing it. (Code 1923, §§ 7353, 7354; Code 1940 T.7, §§ 111, 112)

PETITIONER COMMENT Re STATUTES. As stated in petitioner's Brief (R1-23 at 5), "the criminal statutes may provide guidelines (and specifics) for civil tort liability." Regarding the civil statute for fraudulent deceit in Alabama Code (argued in R1-23 at 1-2), which reached defendants' conduct at the deposition, petitioner's averments indicated that although defendants did not close the requisites to complete fraud, their purposeful persistent deceitfulness over the two days deposition for petitioner added to the cumulative impact on petitioner resulting in distress.

STATEMENT OF THE CASE

This diversity action was commenced on September 30, 2002 when the petitioner, who is a resident citizen of the State of Alabama, filed a complaint in the United States District Court for the Northern District of Alabama, Southern Division, against the Respondents Carrier and Comfort Systems. Petitioner averred a claim against respondents for "intentional and reckless infliction of severe emotional distress during two full days of deposition by two attorneys for defendants" whose "outrageous conduct was the proximate cause of a serious injury." R1-1 at 1-2.

Petitioner and his wife were pro se deponents during three days of deposition 29 September, 3 October, and 17 October 2000 connected with a State trial for a single claim of breach of contract[1] scheduled for December 2000; conducting the deposition were attorneys for Carrier and Standard Co. owned by Comfort Systems.

Soon after the Complaint was filed in the U.S. District Court, an Order (App. 28-29) was issued essentially barring petitioner from FRCP 4, if the Complaint was not served within 11 days[2]. After petitioner's filing of the Response to the Order (R1-3) almost three months passed when petitioner's anxiety was abated as a result of his filing of Motion for Confirmation (R1-4) [of an assurance over the telephone] followed by the Order (App. 27) allowing the 120 days under FRCP 4(m); this correction by-

[1] The claim was the reinstated (July 1998) remnant of a suit involving breach of contract, breach of warranty, negligence, and fraud, which suit was totally dismissed on summary judgment in May 1998. R1-1 at 8. The breach of contract was again dismissed by a new Trial Judge in early 2000 without any legal basis; the Judge, after much trouble on plaintiffs' part, eventually reinstated thereafter the breach of contract count for which the deposition was conducted in connection with the December 2000 scheduled jury trial.

[2] At the time of filing, petitioner was still feeling too ill to contemplate a possible amendment within the 11 days; there was no court action to petitioner's Response to the Order, in which he is asking for reconsideration of the time.

passed the facts of the original Order.

In response to the Pleadings, defendants filed motions to dismiss. R1-11 and R1-13. With these motions, both defendants wrote letters to the Magistrate Judge bringing up briefing schedule. Scheduling Orders were issued for Carrier and Comfort Systems and for plaintiff-petitioner (App. 25 and 26). It was with reference to the briefing schedule that Carrier filed with its Brief (R1-16) in Support of Motion to Dismiss and Motion for Attorneys' Fees (the latter later withdrawn) matters outside the pleadings that consisted of Attorney for Carrier's Affidavit, unnotarized, in which he refers to the State case deposition transcript in his ¶ 6.

The State case deposition transcript was released by the court reporter in violation of Alabama, and Federal Rule of Civil Procedure 30(e). As it turned out only part of such deposition transcript was filed by the defendant with the U.S. District Court through an anonymous entry under the Docket No. 17; this deposition transcript was not served on petitioner.

Carrier also filed with the U.S. District Court an Affidavit of the court reporter (the same person who released the deposition transcript) - supposedly resembling the reality at the deposition - raising an issue that did not even arise at the deposition. R1-25. This out of time filing was granted by an Order (App. 11).

Petitioner's filed Brief (R1-23) contained matters not outside the Pleadings with attached affidavits attesting to the authenticity of statements in the Pleadings and controverting defendants' evidence.

On November 12, 2003 the Magistrate Judge issued a Report and Recommendation (App. 12-23) granting defendants' motions to dismiss which had been converted to motions for summary judgment. In response, plaintiff filed Objection (R1-30) in which

among the list of evidentiary material offered are medical records including clinical evidence. This was followed by November 25, 2003 Order of Reassignment (App. 10). The United States District Court Judge to whom the case was assigned issued Memorandum of Opinion (App. 9) and Order of Dismissal (App. 8), both on December 1, 2003.

The Eleventh Circuit PER CURIAM (App. 1-6) affirmed dismissal on the 12(b)(6) level. The Eleventh Circuit judgment, which petitioner seeks to have reviewed, was entered July 7, 2004. Petition to the Eleventh Circuit for Panel Rehearing was denied August 26, 2004 (App. 7).

ARGUMENT IN SUPPORT OF PETITION AND REASONS FOR GRANTING THE WRIT

Petitioner relies on Rule 10(a) of the United States Supreme Court, which indicates the character of the reasons the Court considers for granting review: "a United States Court of Appeals ... has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court's supervisory power; ..."

I. THE DECISION BY THE COURT BELOW IS IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Prior decisions of this Court compel the conclusion that the Eleventh Circuit decision to affirm the District Court dismissal of petitioner's cause of action on the 12(b)(6) level is in direct conflict with this Court's decisions. In *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974) this Court held that "...the allegations of the complaint should be construed favorably to the pleader." In *Hishon v. King and Spaulding*, 467 U.S. 69, 73 (1984), this Court held that a "court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In *Conley* this Court held that a court should dismiss a suit under FRCP 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley* at 45-46. To all indications of this Court's holdings, petitioner's cause of action should withstand a challenge under FRCP 12(b)(6) motions to dismiss. The Eleventh Circuit's decision regarding affirmation

of the District Court's dismissal resulted from a switchover[3] from the summary judgment standard to the 12(b)(6) standard.

II. THE DISTRICT COURT DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AND THE ELEVENTH CIRCUIT SANCTIONED SUCH DEPARTURE IN CASE WHERE THE PLEADINGS ARE FAR MORE THAN SUFFICIENT Re EVIDENCE.

Petitioner's Complaint (R1-1) and Amendment to Complaint (R1-6), jointly referred to as Pleadings[4], sets out all the facts essential to constitute a legal cause of action and contains sufficient allegations showing that an actionable wrong was done by concert of action and common intent and purpose - a joint infringement of plaintiff's rights as a person. The Pleadings aver that defendants breached their legal duty by intentionally inflicting severe emotional distress resulting in serious legal injuries proximately caused by their tortuous conduct.

The attorney for Standard Co. used a maxim concerning what defendants were entitled to do in the eyes of the law to misrepresent defendants' intent regarding the transgressions that were to follow. R1-6 at 3 and 7.

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[3]The dismissal of the case in the lower court was based on the change of motions to dismiss to motion for summary judgment without giving Notice to plaintiff-petitioner; plaintiff objected; one of the issues on Appeal was conversion of motions without notice, but the Appellate Court reverted to dismissal at the 12(b)(6) level, stating that "[t]he District Court did not need to convert the defendants' Rule 12(b)(6) motions into motions for summary judgment." However, an objective review of the Magistrate Judge's Report and Recommendation (App. 12-23) would show that the Judge's conclusion is based on matter defendants submitted outside the pleadings, and on the suppression by the Magistrate Judge of material facts and averments contained in petitioner's Pleadings.

[4]Petitioner's filed with the District Court Pleadings are based on personal knowledge and experience and transcriptions from deposition sound tapes preserved for petitioner by State Court Order and procured by plaintiff-petitioner.

Violating the governing laws of the State[5] (see Statutes section), defendants engaged in conduct that hardly can be described as merely adversarial by trickery, R1-1 at 9, ¶ (27), threatening, coercion, and intimidation, R1-1 at 10-11, ¶¶ (28), (31), R1-6 at 11-12, 14-15, and 17-21, ¶¶ (42), (46), (48), deceit and distortion of testimony, R1-1 at 10-11, ¶¶ (29), (31), R1-6 at 11-12 and 15-21, ¶¶ (42), (47), (48), menacing and reckless endangerment, R1-1 at 10 and 12-13, ¶¶ (30), (36), R1-6 at 17-21, ¶ (48), inappropriate body language, R1-1 at 10-11, ¶ (31), R1-6 at 13-14, ¶ (45), shouting, R1-1 at 10-13, ¶ (31), oppression, R1-1 at 11 and 13, ¶¶ (32), (37), R1-6 at 13-14 and 15-17, ¶¶ (45), (47), and humiliating giggling, R1-1 at 11, ¶ (33), R1-6 at 13-15, ¶¶ (45), (46).

Included among petitioner's averments is reference to plaintiff's "elderly gravely ill primary care physician who while undergoing an invasive test, sustained a serious medical accident and was recuperating from emergency surgery" (R1-1 at 11) and a quotation from the October 3, 2000 deposition sound tapes: "the doctor I'm referring to had ... accidental puncture of artery. He is very ill, so I'm not going to bring this up now." R1-6 at 14. (Plaintiff's reluctance to subject his elderly recuperating physician to questioning, at the time of his illness, by these defendants was taken against plaintiff in the Magistrate Judge's Report and Recommendation (App. 12-23)).

In addition to sufficiency, the Pleadings show that the deposition conducted by defendants has the following factual characteristics.

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[5]With respect to criminal coercion, as the legislative intent is "to deal with several forms of coercive conduct" (§ 13A-6-25 Commentary), the applicable parts of this statute are those related to specific averments in the Pleadings concerning the defendants' coercive and intimidating conduct. With respect to fraudulent deceit, the kind of deceit that was persistent during the two days of deposition for petitioner is generally subsumed by § 6-5-104(a), (b)(1) and mostly (2) of the Statute section of this petition.

SPECIAL RELATIONSHIP. The special relationship of the respondents (defense attorneys conducting the deposition) with the petitioner (pro se deponent) gave the respondents power over the petitioner to affect his interest. *Weiszmann v. Kirkland and Ellis*, 732 F.Supp. 1540, 1548 (D. Colo. 1990).

LENGTH OF RECKLESS CONDUCT. The three days of deposition conducted by defendants for a single claim of breach of contract scheduled for jury trial, two of those days for petitioner, during which days petitioner was subjected to conduct summarized in the numerous averments of the Pleadings (see enumeration of the paragraphs and their general content above, Part II of this Petition), shows the degree of the outrage; the issue at the deposition was not complex; it was based in the essentials for the installation of the 3½ ton heating and air conditioning system which can be stated in two lines on a page.

INTENT THAT GOES BEYOND ACCEPTABLE BOUNDS. Transcribed into the Complaint is evidence that petitioner had a mild stroke in 1996. R1-1 at 4-5. The Complaint avers that defendants knew about petitioner's prior health condition when, with deliberate indifference, they engaged in their injurious conduct at deposition. R1-1 at 12. Defendants' deliberate indifference was "intent to cause distress or a reckless disregard of the high probability of distress, and resultant severe emotional distress." *Stingley v. State of Arizona*, 796 F.Supp. 424, 431 (D. Ariz. 1992). Signs of petitioner's distress are discernible from the deposition sound tapes early on the first day of deposition September 29, 2000. R1-6 at 10. Defendants willfully ignored these signs of distress and the cumulative effect of their conduct on petitioner. Their deliberate intent to inflict injury and harm did not diminish even after petitioner's expression of concern for his health close to the end of the first day of deposition after he was shaken, and in fear as a result of counsel for defendant Carrier's menacing commotion followed by his reckless endangerment of plaintiff (R1-1 at 11); while this was occurring, counsel for

Standard Co. was standing at, and watching the door. The Pleadings show that the behavior of these defendants at deposition indicates "an intent that goes beyond all acceptable bounds." *Proudfoot v. Williams*, 803 F.Supp. 1048, 1054 (E.D. Pa. 1992). Late in 2001 after repeated review of that part of the deposition sound tapes, petitioner identified the two events at the deposition with violation of Ala. Code §§ 13A-6-23(a) and 13A-6-24(a). R1-1 at 12.

PAST CONDUCT OF DEFENDANTS. Not as part of averments, plaintiff's pleadings show in detail how defendants were engaged in a pattern of wrongful conduct, violating procedural and substantive law. R1-1 at 5-9; R1-6 at 12-13. Plaintiff's injury and loss proximately caused by defendants' conduct at deposition is a testimony of defendants' continuation of wrongful conduct against plaintiff-petitioner.

Closely related to the by-passing of the legal sufficiency of the Pleadings is the matter of suppressing and/or expressing skepticism concerning the material facts in the Pleadings. The departure from accepted proceedings is pervasive throughout the Magistrate Judge's Report and Recommendation (App. 12-23) and the Eleventh Circuit Per Curiam (App. 1-6); the addition of the fraud claim, an act against petitioner's Pleadings, not in accord with accepted judicial proceedings, contradicts the material facts and evidence whose existence is shown in sufficient detail in the Pleadings.

This Court held in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999) that "in reviewing the legal sufficiency of petitioner's cause of action [the Court] must assume the truth of the material facts alleged in the complaint." The Eleventh Circuit's statements in the Per Curiam on pages 2 and 4, using the qualifiers "even if" and "even taking" fall short of the requirement of assuming all material facts in the Complaint are true.

Petitioner notes from the Record that both defendants filed Motions to Dismiss (R1-11 and R1-13); additionally by way of letters to the Magistrate Judge suggesting briefs (copies of letters attached to Doc 11 and Doc 13 of petitioner's Record Excerpts to the Eleventh Circuit), briefs were scheduled by the Magistrate Judge (App. 25, 26) and filed; while defendants' purpose was to argue with matters outside the pleadings, petitioner's Brief (R1-23) was filed for the purpose to attest to the authenticity of quotations transcribed from the deposition sound tapes into the Pleadings and to controvert the accuracy and assertions of Carrier's filed matter.

The Magistrate Judge's Report and Recommendation arbitrarily includes a few averments from the Complaint and replaces by section titles the averments most damaging to defendants, including most averments in the Complaint, and all averments in Amendment to Complaint. The Report minimizes and by-passes fact events brought up in petitioner's Pleadings that are based on deposition sound tapes preserved by State Court Order and procured by petitioner. Because the Pleadings aver sufficiently the existence of evidence that supports petitioner's claim, the Report, by exclusive reliance on the defendants' transcript, failed to take material facts in the transcript as true. Under the presumption that the defendants' State case deposition transcript filed with the U.S. District Court, but not served on plaintiff, is genuine, it must correspond to the deposition sound tapes (both taken at the deposition by the same Court Reporter). The incomparable difference between the true facts transcribed into the pleadings from the deposition sound tapes, and the conclusions reached in the Magistrate Judge's Report and Recommendation suggests that there is something very wrong with the judicial process that led to such conclusions. In any case the affirmation of the Eleventh Circuit Court on the 12(b)(6) level sanctioned the lower court's departure from adherence to the 12(b)(6) standard.

III. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH PRECEDENT SET BY THE ALABAMA SUPREME COURT.

Alabama courts apply the law of the state where the injury occurred. *Glass v. Southern Wrecker Sales*, 990 F.Supp. 1344 (M.D. Ala. 1998). In petitioner's case, this is the State of Alabama. The Magistrate Judge's Report and Recommendation (App. 12-23), upon which the dismissal of petitioner's case is based, cites at App. 20 an Alabama Supreme Court case where three elements specifying Alabama law for intentional infliction of emotional distress are listed, but ignores the Supreme Court qualification of the applicability of the law when physical injury is involved and documented.

Referring to *Thomas v. BSE Industrial Contractors, Inc.*, 624 So.2d 1041, 1044 (Ala. 1993), the Eleventh Circuit sanctioned the lower court's basing its decision on three types of cases for intentional infliction of emotional distress - cases where physical injuries are not present - as the only categories of outrage worthy of submission to a jury. Yet the Alabama Supreme Court's finding (*Thomas* at 1041, 1042) that "[w]orker's generalized fear of cancer from exposure to asbestos did not rise to level of severe emotional distress necessary to support claim ... for tort of outrage *absent any clinical evidence that worker had suffered any injury from exposure*; ..." (emphasis added) is precedential support for the need to take clinical evidence of injury into account when considering the elements of the tort of outrage. In petitioner's case the Pleadings show in sufficient detail the existence of medical evidence supporting the averments of extreme and outrageous conduct, for the two days of deposition on the breach of contract claim resulting in serious permanent physical injury (R1-1 and R1-6). Further in response to the Magistrate Judge's Report and Recommendation (App. 12-23) converting motions to dismiss to motions for summary judgment without giving notice of intent to do so (FRCP 56(c)), petitioner filed Objection in

which, among the evidence offered to the Court, are copies of medical records (R1-30 at 2).

The Alabama Supreme Court finding in *Thomas* at 1041, 1042 has support in the Alabama Constitutional Provision Article I, § 13 stating that

> "...every person, for an injury done to him in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without .... delay."

The Magistrate Judge's Report and Recommendation minimizes and discounts the fact matter in the Pleadings: that defendants engaged in outrageous conduct at lengthy deposition inflicting recklessly severe emotional distress that resulted in injury and serious health problems in order to disable plaintiff from carrying his case before a jury in the State action[6], knowing that plaintiff was 76 years and that the United States Government would pay for an allowable share of the expenses through Medicare for health problems resulting from their tortuous conduct. The Report and Recommendation suppressed the fact that by defendants' intentional conduct, they essentially defrauded the federal government of more than $8,500.00 just for initial medical expenses.

The Eleventh Circuit Per Curiam states that plaintiff "was diagnosed as having a "Transient Ischemic Attack" on 10 October 2000," but gives no information about the circumstances. By failing to reveal that the 10 October 2000 diagnosis of plaintiff involved emergency admission and hospitalization preceded by

[6]On November 17, 2000 plaintiffs moved for dismissal of the State case for the single claim of breach of contract scheduled for jury trial in December 2000; the reason was the deteriorating health of the petitioner following the deposition.

October 6, 2000 examination (which is detailed in Appellate Brief, ¶ 19 at p. 10) by his primary care doctor for health problems stemming solely from defendants' tortious conduct (R1-1, ¶ (38) at 13) at deposition, and that the money damages sought included more than $8,500.00 for reimbursement to the United States Government for its Medicare coverage for this hospitalization, the Eleventh Circuit Court sanctioned the District Court's minimization of defendants' conduct and of the serious injury resulting from the conduct.

The Eleventh Circuit Court refers to "barbaric methods employed to coerce an insurance settlement," a case where no injury resulted, as recognized under intentional infliction of emotion distress. In petitioner's case companies, conducting three days of deposition with two days for petitioner, to protect against existing evidence of their breach of contract for a scheduled jury trial, used deceit, menacing, and reckless endangerment, among others, in further violation of the law to disable plaintiff and prevent him from bringing his evidence before a jury, inflicting permanent injury and resulting in other recurring health problems.

The Eleventh Circuit Per Curiam (p. 6) refers to intentional infliction of emotional distress as "an extremely limited cause of action," citing *Potts v. Hayes*, 771 So.2d 462, 465 (Ala. 2000), and goes on to state the three kinds of conduct recognized by the Alabama Supreme Court. The Eleventh Circuit, by endorsing the Magistrate Judge's Report and Recommendation's misrepresentative version of plaintiff's Pleadings and then supporting the concept of limitation in three categories or three kinds of conduct (both courts refer to the same group of cases), departed from the accepted course of judicial proceedings. The departure warrants review by this Court.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, reverse the judgment of the Court of Appeals, and remand the case with directions to enter a judgment reversing the Order of the District Court (App. 8).

Respectfully submitted,

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